UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

RUSSELL PLASTERING CO.[1]

Employer

and **Case 7-RC-22481**

LOCAL 67, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO

Petitioner

and

LOCAL 9, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO

Intervenor

APPEARANCES:

James Russell, of Detroit, Michigan, for the Employer.
Eric Frankie, Attorney, of Detroit, Michigan, for the Petitioner.
John Adam, Attorney, of Southfield, Michigan, for the Intervenor.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

[1] The name of the Employer appears as amended at hearing.
[2] The Petitioner and Intervenor filed briefs, which were carefully considered.

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Petitioner is currently recognized as the bargaining representative of a unit of approximately 8 to 10 full-time and regular part-time plasterers employed by the Employer working at or out of its facility located at 7321 Gratiot Avenue, Detroit, Michigan, in certain areas of Michigan; but excluding all other employees, and guards and supervisors as defined in the Act.[3] It desires certification under the Act. The Intervenor argues that an election is barred by Petitioner's Section 9(a) contract with Architectural Contractors Trade Association (ACT), as the Employer has agreed with the Petitioner to be bound by its terms. In addition, the Intervenor contends that the contract bars an election because the unit in which the Petitioner seeks an election is not co-extensive with its existing unit.

For the reasons set forth below, I find there is no contract bar to the instant petition because the Petitioner is the recognized bargaining agent of the employees covered by the contract and may petition for certification during the term of its own contract. In addition, I find that the fact the Petitioner is seeking to represent a larger unit than it currently represents does not preclude Petitioner from seeking certification.

The Employer is engaged in the building and construction industry performing plastering work within the state of Michigan. On June 26, 2000, the Employer signed an agreement with the Petitioner agreeing to be bound by Petitioner's contract with ACT, a multi-employer association formed for purposes of collective bargaining, formerly known as the Detroit Association of Wall and

[3] The Intervenor introduced at hearing a Plan for Settlement of Jurisdictional Disputes in the Construction Industry arbitration decision concerning a jurisdictional dispute involving the parties to this case, arguing that it prohibited the Employer from being a party to a contract with the Petitioner in certain areas of Michigan. The Intervenor failed, however, to demonstrate either at hearing or in its brief how this decision purportedly impacts the instant petition. Moreover, the decision deals with the assignment of work on only one particular project that has not yet begun, has no effect on the appropriate unit, and is not binding on the Board.

Ceiling Contractors.[4] The contract between ACT and the Petitioner in effect at the time was a Section 8(f) agreement, with a provision allowing the contract to roll over absent notice by either party. Subsequently, ACT and the Petitioner entered into a Section 9(a) agreement effective by its terms from August 1, 2000 through May 31, 2003. That agreement initially covered work performed in certain areas in Michigan, including Wayne, Oakland, Lapeer, Macomb, and St. Clair counties. At the end of November 2000, ACT and the Petitioner signed an "Agreement to Amend Collective Bargaining Agreement" which expanded the territorial coverage of the 2000-2003 agreement to additionally include the counties of Washtenaw and Sanilac, and portions of Livingston County.[5]

The Intervenor contends that the Petitioner's contract with ACT serves as a bar to the instant petition. At the time the Employer executed an agreement to be bound by the contract between ACT and the Petitioner, the contract in effect was a Section 8(f) agreement.[6] The Petitioner and ACT later entered into a Section 9(a) agreement. There is no evidence, however, that the bargaining relationship between the Employer and the Petitioner likewise converted to a Section 9(a) relationship. To establish voluntary recognition in the construction industry pursuant to Section 9(a), the Board requires evidence (1) that the union unequivocally demanded recognition as the employees' Section 9(a) representative, and (2) that the employer unequivocally accepted it as such. ***H.Y. Floors & Gameline Painting***, 331 NLRB 304 (2000). The Board also requires a contemporaneous showing of majority support by the union at the time Section 9(a) recognition is granted. ***Golden West Electric***, 307 NLRB 1494, 1495 (1992).

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[4] In Architectural Contractors Trade Association, Case 7-CA-22466, issued contemporaneously with this decision, in which the Petitioner sought an election in a multi-employer unit, the undersigned found that despite the employers' membership in ACT, their respective units remained separate.

[5] In ***Gem Management Company, Inc.***, 339 NLRB No. 71 (2003), which involved the 2000-2003 agreement between ACT and the Petitioner, the Board found that this amendment did not bind non-members of the association who adopted the contract.

[6] Sec. 8(f) of the Act reads as follows:

"It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

As to this contemporaneous showing, the Board has held that an employer's acknowledgment of such support is sufficient to preclude a challenge to majority status by an employer. ***H.Y. Floors & Gameline Painting***, supra; ***Oklahoma Installation Co.***, 325 NLRB 741 (1998).

The record is devoid of evidence that any of these conditions took place with regard to the bargaining relationship between the Petitioner and the Employer. The Employer's agreement to be bound as a non-member of the association predates the 2000-2003 contract between ACT and the Petitioner, which acknowledged their Section 9(a) relationship. Thus, while the Petitioner's relationship with ACT converted to a Section 9(a) relationship, the Petitioner's relationship with the Employer remained governed by Section 8(f). Compare ***Verkler, Inc.***, 337 NLRB No. 18 (2001); ***Reichenbach Ceiling & Partition Co.***, 337 NLRB No. 17 (2001). An 8(f) contract will not serve as a bar to a petition filed at any time pursuant to Section 9(c). ***John Deklewa & Sons***, 282 NLRB 1372 (1987), enfd. sub nom. ***Iron Workers Local 3 v. NLRB***, 843 F.2d 770 (3d Cir 1988), cert. denied 488 U.S. 889 (1988).

Moreover, even if the Petitioner and Employer have a Section 9(a) relationship, it is well established that an employer's recognition of, and current contract with, a petitioning union does not bar a petition for certification by that union. ***Duke Power***, 173 NLRB 240 (1969). A recognized bargaining agent is entitled to the benefits of certification. ***Id.***; ***General Box Co.***, 82 NLRB 678 (1949). Although Intervenor argues that the timing of the filing of the instant petition—three days before the ACT collective bargaining agreement was to expire—should preclude the Petitioner from seeking the benefits of certification, the Board will entertain a petition filed by a voluntarily recognized union desiring certification at any time during the contract term. ***Id.*** There are no time constraints in that situation comparable to the insulated period under the contract bar doctrine.[7]

In addition, the Intervenor argues that the unit in which the Petitioner seeks an election goes beyond the existing geographical unit and, because it is not co-extensive with its existing unit, this should preclude the Petitioner from relying on ***General Box***. In other words, the Petitioner is seeking an election in a unit comprised of employees covered by Petitioner's contract and some employees who are not covered and, thus, the Intervenor argues, the ACT contract should bar the election. A contract, however, cannot bar an election as to employees to which

[7] The parties to a contract which is approaching its expiration date are provided with a 60-day "insulated period" immediately preceding and including the expiration date to negotiate and execute a new contract. The insulated period does not apply where, as here, the contract is not a bar for other reasons under Board rules. ***National Brassiere Products Corp.***, 122 NLRB 965 (1959); ***Stewart-Warner Corp.***, 123 NLRB 447 (1959).

the contract does not apply. ***Duke Power***, supra at 240-241. Accordingly, I find that the Petitioner's contract with ACT is not a bar to the instant petition.

5. Based on the foregoing, and the record as a whole, I find that the following employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time plasterers employed by the Employer working at or out of its facility located at 7321 Gratiot Avenue, Detroit, Michigan; but excluding all other employees, and guards and supervisors as defined in the Act.

Those eligible to vote shall vote as set forth in the attached Direction of Election.[8]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees who have been employed for 30 working days or more within the 12 months preceding the eligibility date or if they have had some employment in those 12 months and have been employed for 45 working days or more within the 24-month period immediately preceding the eligibility date. Ineligible are those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

LOCAL 67, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, AFL-CIO

or

LOCAL 9, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, AFL-CIO

LIST OF VOTERS[9]

[8] The parties stipulated that the construction industry eligibility formula set forth in ***Daniel Construction Co.***, 133 NLRB 264 (1961), is applicable to this case, and I find that formula to be appropriate.

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. ***Excelsior Underwear, Inc.***, 156 NLRB 1236 (1966); ***NLRB v. Wyman-Gordon Company***, 394 U.S. 759 (1969); ***North Macon Health Care Facility***, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **July 16, 2003 .** No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570.** This request must be received by the Board in Washington by**, July 23, 2003**.

Section 103.20 of the Board's Rule concerns the posting of election notices. Your attention is directed to the attached copy of that Section.

Dated at Detroit, Michigan, this 9th day of July 2003.

(SEAL)

/s/ Stephen M. Glasser
Stephen M. Glasser, Regional Director
National Labor Relations Board-Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue –Room 300
Detroit, Michigan 48226

Classifications

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347 4040 5080 0000

[9] If the election involves professional and nonprofessional employees, it is requested that separate lists be submitted for each voting group.